UNITED NATIONS

TD

United Nations Conference on Trade and Development

Distr.
GENERAL

TD/RBP/CONF.5/3
3 August 2000

Original: ENGLISH

Fourth United Nations Conference to Review
All Aspects of the Set of Multilaterally Agreed
Equitable Principles and Rules for the Control
of Restrictive Business Practices
Geneva, 25 September 2000
Item 6 (a) of the provisional agenda

REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(a) REVIEW OF APPLICATION AND IMPLEMENTATION OF THE SET

Assessment of the operation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

EXECUTIVE SUMMARY

This note, prepared by the Secretary-General of UNCTAD, reviews major developments which have taken place at the national, regional and multilateral levels in the field of competition law and policy, more particularly since November 1995, when the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held. At the multilateral level, mention is made of UNCTAD's cooperation with the World Bank and WTO, as well as the outcome of UNCTAD X (February 2000). The note then reviews in part II the operation of the Set in the field of competition, looking at its main provisions, drawing attention to their actuality and evaluating the extent to which they have been implemented to date. In part III, an evaluation is made of progress in implementation by States members of UNCTAD and by the Intergovernmental Group of Experts on Competition Law and Policy of the resolution adopted by the Third Review Conference, drawing attention to technical cooperation, informal consultations and specific studies undertaken by the Group. Finally, in part IV, the note looks at possible activities in the field of competition law and policy which the Fourth Review Conference might wish to launch in the light of the decisions taken by UNCTAD X.

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I. INTRODUCTION

1. Almost 20 years have passed since the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the United Nations General Assembly in resolution 35/63 of 5 December 1980, and yet, on the multilateral front, the Set is still the only fully multilateral framework on competition in existence today. The issue of competition law and policy, however, has undoubtedly achieved a higher profile at the national, regional and multilateral levels. At the national level, some 60 countries, including developing countries and economies in transition, have adopted competition laws. In addition, most other countries are now aware of the importance of competition policy, and many, including least developed countries, are in the process of drafting competition legislation. At the regional level, numerous groupings of States, such as the Free Trade Area of the Americas (FTAA), the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA), the Caribbean Community (CARICOM) and MERCOSUR in the Americas, the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the Central African Customs and Economic Union (UDEAC) in Africa, and the Asia-Pacific Economic Cooperation Forum (APEC) and the South Asian Association for Regional Cooperation (SAARC) in Asia, have established or are in the process of establishing working groups on competition, and some intend to adopt regional competition rules.

2. UNCTAD, the World Bank, WTO and OECD have been very active in spreading competition law and policy principles throughout the world, while competition authorities of member States have also been very active in this field, both bilaterally and through active cooperation with international organizations. Another indication of the higher profile given to competition by international organizations is the increasing number of publications issued in this respect.[1]

3. In the period between the Third United Nations Conference to Review All Aspects of the Set in 1995 and the Fourth Review Conference (scheduled for 25-29 September 2000), two Expert Meetings on Competition Law and Policy and two sessions of the Intergovernmental Group of Experts on Competition Law and Policy have taken place at UNCTAD. The second session of the Intergovernmental Group of Experts (Geneva, 7-9 June 1999) acted as the preparatory meeting for the Fourth Review Conference.

4. The Singapore Declaration of December 1996,[2] which established two new Working Groups at WTO - a Working Group on Trade and Investment, and a Working Group on the Interaction between Trade and Competition Policy - requested the latter group "to identify areas that may merit further consideration in the WTO framework". In the Singapore Declaration, it was agreed that "these groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate international forums". In the conduct of the WTO Working Groups, cooperation with UNCTAD and other appropriate organizations was called for "to make the best use of available resources and to ensure that the development dimension is taken fully into account" (para. 20 of the Singapore Declaration). In line with the Singapore Declaration, UNCTAD has been represented in the Working Group on the Interaction between Trade and Competition Policy in an observer capacity, and it has cooperated to the fullest extent in ensuring that the development dimension is

taken fully into account. Special attention was drawn by UNCTAD to the provision for preferential and differential treatment contained in Section B of the Set of Principles and Rules. Cooperation has included the holding of four joint WTO/UNCTAD/World Bank Symposia on Competition Policy, Economic Development and the Multilateral Trading System. In its agreed conclusions of June 1999 (TD/B/COM.2/19-TD/B/COM.2/CLP.14, chapter I), the Intergovernmental Group of Experts on Competition Law and Policy invited the Secretary-General of UNCTAD to continue cooperation with WTO and other organizations working in the area of competition law and policy.

5. In February 2000, UNCTAD X took place in Bangkok. The Conference, which examined "developmental strategies in an increasingly interdependent world: applying the lessons of the past to make globalization an effective instrument for the development of all countries and all people", considered the role of competition law and policy in this context and agreed that: "In addition to national efforts, the international community as a whole has the responsibility to ensure an enabling global environment through an enhanced cooperation in the fields of trade, investment, competition and finance and to contribute to currency stability, so as to make globalization more efficient and equitable" (Bangkok Declaration: Global Dialogue and Dynamic Engagement, TD/387). It is important to note that competition was included among UNCTAD's top priorities in contributing to making globalization both more efficient and more equitable. In fact, it is agreed in the Set (see in particular para. 10 below, dealing with objective No. 2) that competition increases efficiency. Moreover, the Set also recognizes that competition policy is aimed at creating a more equitable environment (see para. 11 below, on Objective No. 3 of the Set, which is "to protect and promote social welfare ... and the interests of consumers" and the Set itself, which is entitled "Set of Equitable Principles and Rules", in particular because it endorses the principle of "preferential or differential treatment for developing countries", as embodied in Section C of the Set, as described in para. 12 below).

6. In addition to the Bangkok Declaration, UNCTAD X adopted a Plan of Action (contained in TD/386) which contains the following decisions with respect to competition issues:

> "140. UNCTAD should continue and expand its help to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy.
>
> 141. UNCTAD's work in this area should, in cooperation with UNDP, the World Bank and other relevant organizations, strengthen the capacity of public institutions for competition and consumer protection in developing countries and help them to educate the public and representatives of the private sector in this field.
>
> 142. UNCTAD should continue to examine issues related to competition law and policy of particular relevance to development. It should prepare periodical reports on restraints in strategic sectors and their impact on developing countries and countries with economies in transition, particularly on their competitiveness. UNCTAD should study in depth the developmental impact of possible international agreements on competition.

143. UNCTAD should also further study, clarify and monitor, including through specific country and case studies, the relationship between competition and competitiveness as well as trade-related aspects of competition."

7. The Fourth Review Conference will certainly wish to reflect upon these important issues, which should be embodied in UNCTAD's further programme of work in the field of competition law and policy. The Conference might also wish to reflect upon and take a decision on the proposal made by some delegations during UNCTAD X, but which was not decided during UNCTAD X, of establishing within UNCTAD a new Expert Meeting on Consumer Policy, to act as a separate body from the Intergovernmental Group of Experts on Competition Law and Policy.

II. OPERATION OF THE SET

8. Objective No. 1 of the Set, namely "to ensure that restrictive business practices do not impede or negate the realization of the benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries", is of particular relevance today, as globalization is rapidly expanding and more and more questions are being raised concerning the effects of liberalization and globalization of world markets, especially with respect to the weaker players on the global stage.

9. One important issue is the rapidly growing concentration of market power which is taking place in global markets through mergers and acquisitions, constantly raising the level of entry for new players in such markets. While important actions to challenge abuses of dominant positions of market power are taking place in some developed countries,[3] most developing countries are still unable to come to grips with the creation and abuse of dominant market power affecting their national interests both in domestic markets and, especially, in world markets. It should be noted that in line with the request made by the Intergovernmental Group of Experts on Competition Law and Policy in its agreed conclusions (TD/B/COM.2/19-TD/B/COM.2/CLP/14, Chapter I, op. para. 10), the UNCTAD secretariat is making available to the Fourth Review Conference a Revised Model Law (document TD/RBP/CONF.5/7), which contains specific merger control rules and commentary thereupon.

10. With respect to Objective No. 2, namely "to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through (a) the creation, encouragement and protection of competition; (b) control of concentration of market power; (c) encouragement of innovation", the results have been mixed during the period under review. Although since 1995 most developing countries and economies in transition have shown interest in competition policy and many have requested technical assistance and advisory services to draft new legislation, to date only a few have actually adopted new competition laws: Panama, Hungary and Romania (in 1996), Zimbabwe (in 1997) and Morocco (in 1999). Moreover, as discussed in the concluding part of this note, it is not sufficient for a country to have a competition law on its statute books; it is necessary for its competition policy to have an effective impact on the economy. Setting up a competition authority can take time, and political will is necessary to sustain the momentum in the years that follow its establishment. Some

countries undergoing economic crises or changes of government may find that their Governments have changed priorities, and some competition authorities which enjoyed political support when they were established may now face decay and loss of support from the executive power.

11. Objective No. 3, namely "to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries", is receiving increased attention in some countries. As a result of UNCTAD IX's decision to request the UNCTAD secretariat to "support strategies in promoting national competition and consumer protection law and policy formulation" (TD/377, para. 97 (ii)), UNCTAD has implemented technical assistance programmes which include a strong consumer protection component. While the immediate objective of modern competition law is to increase efficiency by promoting competition, one of its important side effects is no doubt to benefit consumers. Moreover, it is increasingly felt that one way to overcome difficulties in implementing competition policy in many developing countries where this is a very new concept which needs to be widely understood is to create and strengthen consumer organizations, which can usefully contribute to consumer information, improve transparency and often draw the attention of competition authorities to anti-competitive practices. As seen in paragraph 6 above, UNCTAD X, in its Plan of Action, paragraph 141, calls upon UNCTAD, in cooperation with other relevant organizations, to strengthen the capacity of public institutions for competition and consumer protection in developing countries, and to help them to educate the public and representatives of the private sector in this field.

The development dimension in the Set

12. Section C, on multilaterally agreed equitable principles for the control of RBP, recognizes in its paragraph 6 the possibility for national legislation to exclude certain sectors from the scope of national competition law, and in paragraph 7 provides for "preferential or differential treatment for developing countries" in order to take into account "the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and

(b) Encouraging their economic development through regional or global arrangements among developing countries".

13. At a time when UNCTAD and other appropriate intergovernmental forums are being called upon "to ensure that the development dimension is taken fully into account",[4] it is important to draw attention, as UNCTAD representatives have done repeatedly at WTO and other meetings, to the development dimension contained in the Set. In line with provision C.7 of the Set, developing countries should be in a position, if need be, to adopt new competition legislation in a progressive or more flexible manner, i.e. by being able to exempt certain sectors from full application of the law if this is considered necessary for developmental reasons. It should be recalled that exceptions to and exemptions from competition laws still exist in many developed countries, for example in sectors such as agriculture, mining and services. While

pressure to deregulate most of those sectors is having an effect in many countries, it should be borne in mind that some countries have maintained such exceptions and exemptions for some 50 years. A degree of flexibility for countries newly opening their market is therefore fully in line with this provision of the Set. Developing countries concerned with the risk of eliminating local industry as a result of the sudden opening of specific markets to strong competition should therefore be in a position to take a more flexible, gradualistic approach in order to ensure that liberalization takes place when their industries are more efficient and are able to compete. Of course, it is not in the interest of countries to keep afloat industries that are never going to be viable without protection and subsidies, thus distorting the allocation of scarce resources.

14. In some countries, small and medium-sized enterprises are allowed to join forces in certain instances, for example in joint-purchasing arrangements in Germany, which allow them to secure conditions of purchase similar to those secured by large firms for their inputs, hence enabling them to compete more effectively with the larger enterprises. Under the Set, similar considerations would be fully justified for developing countries.

15. Interestingly, the European Community, in its submission to the eleventh meeting of the WTO Working Group on the Interaction between Trade and Competition Policy,[5] supports the idea of "flexibility" and "progressivity" in the introduction and implementation of national competition laws in conformity with the kind of multilateral framework on competition which they suggest for adoption at the WTO. With respect to sectoral exclusions, the submission states that "The European Community and its Member States also favour a flexible and progressive approach to the issue of sectoral exclusions from the application of competition law. Some exclusions of a horizontal nature - like, for instance, those which may apply to small- and medium-sized enterprises - may be driven by legitimate development considerations and have only an insignificant impact on international trade". Such proposals, if agreeable to other parties, could be a significant step in the right direction. It is recalled in this connection that the WTO/GATT itself has long applied the principle of "special and differential treatment for developing countries", and that such a flexible approach, in order to take full account of the development dimension, would be fully in line with existing GATT/WTO practice.

The main anti-competitive practices

16. Section D of the Set, on principles and rules for enterprises, including transnational corporations, contains the core anti-competitive practices that should be refrained from by enterprises "engaged on the market in rival or potentially rival activities" or when "through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition" (Section D, paras. 3 and 4). The treatment of horizontal and vertical restraints, as well as dominance and abuse of dominant market power, is further elaborated in UNCTAD's Model Law or Laws on Restrictive Business Practices, of which the latest version is submitted to the Fourth Review Conference in document TD/RBP/CONF.5/7. The full text of the Model Law has been made more "reader-friendly" in that it now contains a number of boxes answering basic questions, and comparative tables indicating the types of laws or solutions adopted by countries for different aspects of the law, as well as a separate new chapter on merger control.

17. The Model Law now contains in its Part I a list of draft possible elements for articles of a competition law, including the title of the law; its objectives or purpose; definitions and scope of application; restrictive agreements or arrangements; acts or behaviour constituting an abuse, or acquisition and abuse, of a dominant position of market power; merger control provisions; some possible aspects of consumer protection; notification; the administering authority and its organization; functions and powers of the administering authority; sanctions and relief; appeals; and actions for damages. This quite simple "backbone" or "table of contents" of issues to consider when drafting a competition law is then complemented in Part II of the Model Law with detailed commentary on the articles, in which a review is made of actual laws in both developed and developing countries, as well as countries in transition, with a view to determining the most recent trends and views on how best to treat each one of the issues considered in the "elements for articles" of the law contained in Part I.

18. It should be noted that some "elements for articles", such as "some possible aspects of consumer protection", "notification" or perhaps "action for damages", are listed in the Model Law as part of a checklist of issues to be considered for inclusion, but it will depend on legislators to decide whether or not to include them in the competition law. For example, the most recent trend has been to adopt consumer protection provisions in an entirely separate law, since competition law is now viewed by most countries as having the promotion of competition as its principal objective and separate legislation is felt necessary in order to cover more fully the issue of consumer protection. Also, with respect to mergers and acquisitions, the new version of the Model Law recognizes that certain countries might wish to adopt competition law while refraining from having merger control, at least for a while.

19. Section E of the Set, on principles and rules for States at national, regional and subregional levels, and section F, on international measures, complement each other, as the call in paragraph 1 of Section E for States "at the national level or through regional groupings" to "adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures" and the provisions calling for exchanges of information and cooperation in Section E are somewhat complemented in Section F, which calls for "work aimed at achieving common approaches" (para. 1); consultations among States (para. 4); continued work within UNCTAD on the elaboration of a Model Law or Laws (para. 5); and technical assistance, advisory and training services (para. 6).

20. As indicated in the introduction to this note, in the period since the Third Review Conference there has been considerable interest on the part of developing countries and economies in transition in studying the issues involved and in drafting competition bills. However, relatively few developing countries have adopted new competition laws in the period under review. It can be said, nevertheless, that most countries in the world are now aware of the issues involved in competition policy, and that many envisage the adoption of domestic legislation in the near future. One can also say that common approaches and trends are on the increase, largely as a result of the important exchanges of views and consultations that take place within the framework of bilateral, regional and multilateral consultations, for example under bilateral cooperation agreements where they exist, and consultations in OECD, the WTO Working Group and UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy at its annual sessions.

21. The informal consultations which take place annually during sessions of the Intergovernmental Group of Experts on Competition Law and Policy have become an appreciated feature of UNCTAD's intergovernmental machinery. This function of the Intergovernmental Group was decided on by the Third Review Conference (para. 9 of the resolution adopted by the Review Conference).[6]

22. Concerning Section G of the Set, on international institutional machinery, it is important to note that while retaining the functions of the Intergovernmental Group of Experts, by recommending in paragraph 13 of its resolution "the continuation of the important and useful work programme within UNCTAD's intergovernmental machinery that addresses competition law and policy issues, and proceeds with the active support and participation of competition law and policy authorities of member countries", the Third Review Conference recommended to the General Assembly that it change the name of the Intergovernmental Group of Experts on Restrictive Business Practices to the Intergovernmental Group of Experts on Competition Law and Policy (para. 14 of the resolution). This recommendation was endorsed by the General Assembly in its resolution 52/182, paragraph 5, of 18 December 1997, and in 1998 and 1999 the Intergovernmental Group of Experts met under its new name.

III. PROGRESS IN IMPLEMENTATION OF THE RESOLUTION ADOPTED BY THE THIRD REVIEW CONFERENCE

23. The resolution adopted by the Third Review Conference (TD/RBP/CONF.4/15, annex I) requested the UNCTAD secretariat to revise documents presented to the Review Conference (para. 1), to revise periodically the commentary to the Model Law (para. 3) and to prepare a draft outline of a possible study on empirical evidence of the benefits to be gained by countries from applying competition law and policy principles to economic development (para. 8). All these studies were prepared in line with the requests contained in the resolution.

24. The UNCTAD secretariat was also requested to carry out a review of technical cooperation activities undertaken by UNCTAD and other international organizations, as well as by States bilaterally. That review was contained in document TD/B/COM.2/EM/9 and was submitted to the Expert Meeting on Competition Law and Policy on 24 November 1997; updated reviews were submitted to the Intergovernmental Group of Experts on Competition Law and Policy in 1998 and 1999; and a new review will be submitted to the Fourth Review Conference in document TD/RBP/CONF.5/5.

25. Requests for technical assistance were met more rapidly than in the past, owing in particular to increased voluntary contributions and expertise received from, among others, Norway, the Netherlands, Italy, France, Germany, the United Kingdom, the United States, the European Union and Sweden, in line with the Review Conference's appeal contained in paragraph 7 of its resolution. As can be seen in detail in the reviews of technical cooperation mentioned above, the UNCTAD secretariat has made a considerable effort to respond as much as possible to the needs expressed by member States at the national as well as subregional levels. It should also be noted that the Working Party on the Medium-Term Plan and the Programme Budget of the Trade and Development Board at its thirty-fourth session conducted an in-depth

evaluation of UNCTAD's programme of technical cooperation activities on competition law and policy in September 1999 (TD/B/WP/119), in which UNCTAD's work in this area was highly praised by participating delegations.

26. With respect to the operation of the Intergovernmental Group of Experts itself, the Third Review Conference decided to promote informal multilateral consultations among participants on competition law and policy issues with a special focus on practical cases (para. 9 of its resolution). As agreed by the Review Conference, at each session of the Intergovernmental Group of Experts on Competition Law and Policy, an understanding is reached as to the subject matter of the consultations to be undertaken during the next session. In addition, member States are invited, if they so wish, to submit additional cases for discussion during the consultations, at least one month in advance of the session of the Intergovernmental Group of Experts so as to permit delegations from all member States to participate.

27. It should be noted that in paragraph 9 of its resolution, the Third Review Conference requested that "future Intergovernmental Group of Experts sessions should include at least three days for informal multilateral consultations". However, this was decided at a time when the duration of sessions was five days; the post-Midrand duration of expert meeting sessions, and subsequently intergovernmental groups of experts, was shortened to three days, and for this reason, the time allotted for informal consultations was three to four half-day sessions. This arrangement seems to have been very satisfactory, as the functioning of the Expert Meeting, followed by the Intergovernmental Group of Experts on Competition Law and Policy, was highly praised by all delegations at UNCTAD's Mid-Term Review, which took place in 1998.

28. In paragraph 11 of its resolution, the Review Conference decided that, "in the light of the strong worldwide trend towards the adoption or reform of competition laws and the development of national competition laws and policies over the period since the Set was adopted, the Intergovernmental Group of Experts should embark on an exercise, upon request from member States and in collaboration with national and regional competition law and policy authorities, to map out and further strengthen common ground among States in the area of competition law and policy in identifying restrictive business practices that affect the economic development of countries. In this context, the focus of the exercise, *inter alia*, should be on:

(a) Identifying 'common ground', i.e. broad similarities in the approaches followed on different competition law and policy questions by Governments;

(b) Shedding light and encouraging exchanges of views in those areas where the identification of 'common ground' is more difficult, for example where there are differences among economic theories, or among competition laws or policies, such as:

(i) The role of competition law and policy in the strengthening and improvement of the economies of developing and other countries and, in particular, the development of the business community;

(ii) Taking into account economic globalization and liberalization of the economies of developing and other countries, to identify appropriate measures to help those countries that might be hampered by RBPs;

(iii) The interface between competition law and policy, technological innovation and efficiency;

(iv) The competition law and policy treatment of vertical restraints and abuses of dominant positions;

(v) The competition policy treatment of the exercise of intellectual property rights (IPRs) and of licences of IPRs or know-how;

(vi) In-depth analysis of differences in the scope of competition laws and policies in individual sectors, in the light of the process of economic globalization and liberalization;

(vii) In-depth analysis of the effectiveness of enforcement of competition laws, including enforcement in cases of RBPs having effects in more than one country."

29. The competition experts and the UNCTAD secretariat have, through the informal consultations and the work embarked upon at the Expert Meetings and sessions of the Intergovernmental Group of Experts on Competition Law and Policy, as well as in technical cooperation programmes, contributed consistently to identifying the extent of "common ground" that exists in the approaches followed by States on different competition law and policy questions; in so doing, they have also shed light and exchanged views on those areas where differences exist. In particular, the study on "empirical evidence of the benefits of competition law and policy" (TD/B/COM.2/EM/10/Rev.1) responds at least in part to paragraph 11 (b) (i) of the conference resolution, and the study on "How competition policy addresses the exercise of intellectual property rights"(TD/RBP/CONF.5/6), submitted to the Fourth Review Conference, should respond to paragraph 11 (b) (v) and in part to paragraph 11 (b) (iii). The question raised under paragraph 11 (b) (iv) was partly treated in document UNCTAD/ITCD/CLP/Misc.8 on vertical restraints, prepared by the secretariat in connection with its technical cooperation projects. Finally, while a first attempt to analyse the effectiveness of enforcement of competition laws in cases of restrictive business practices having effects in more than one country was made in document TD/RBP/CONF.4/6, submitted to the Third Review Conference itself, no further attempt has been made to make further progress on the topic referred to in paragraph 11 (b) (vii) of the resolution.

30. The issues which so far have not been directly dealt with by the Intergovernmental Group of Experts concern the topics referred to in paragraphs 11 (b) (ii) and (vi). These are important issues relating to the developmental dimension of competition law and policy that the Fourth Review Conference might wish to focus on.

31. Finally, the Third Review Conference, in paragraph 12 of its resolution, invited Governments "during future consultations in meetings of the Intergovernmental Group of Experts, to clarify the scope or application of their competition laws and policies, with a view to improving mutual understanding about substantive principles and procedures of competition law and policy, taking into account relevant provisions of the Uruguay Round Agreements. In the context of this exercise, Governments may wish to discuss:

(a) How the Set of Principles and Rules might be better implemented, particularly those provisions which have not been adequately implemented so far;

(b) The competition policy implications at the national, regional and international levels of globalization and liberalization;

(c) Techniques and procedures for detecting and sanctioning collusive tendering, including international cartels and other anti-competitive practices;

(d) The strengthening of information exchange, consultations and cooperation in enforcement at the bilateral, regional and multilateral levels;

(e) How competition laws and policy should apply to State activities such as regulation of State enterprises, State monopolies, natural monopolies and enterprises with exclusive rights granted by the State."

32. Again, the informal consultations and the studies prepared for the expert meetings, as well as some papers prepared for technical cooperation activities, have covered or are in the process of covering some of the issues noted above. In particular, the report on "Experiences gained so far with international cooperation on competition policy issues and the mechanisms used", submitted in document TD/RBP/CONF.5/4 to the Fourth Review Conference, should contain important elements of response to paragraph 12 (d) above. Two papers prepared by the secretariat in the context of technical cooperation, namely "Control of price-fixing and collusive tendering arrangement" (UNCTAD/ITCD/CLP/Misc.4) and "Competition and public utility industries" (UNCTAD/ITCD/CLP/Misc.1), should at least partly respond to paragraphs 12 (c) and (e) respectively. Furthermore, the topic for the informal consultations of the 1999 session of the Intergovernmental Group of Experts on Competition Law and Policy - on "The relationship between the competition authority and relevant regulatory agencies, especially in respect of privatization and demonopolization processes"- should contain important elements of response to paragraph 12 (e) of the resolution.

33. Under paragraph 12 of the resolution, two points have so far not been substantially analysed, namely (a) how the Set might be better implemented, and (b) the competition policy implications of globalization and liberalization at national, regional and international levels. Some thoughts on a response to these questions will be found in the concluding remarks below.

IV. OUTLOOK FOR THE FOURTH REVIEW CONFERENCE

34. The Fourth Review Conference will have an exceptional opportunity to build upon the results of UNCTAD X and the work already undertaken in implementation of the resolution adopted by the Third Review Conference in November 1995. As mentioned earlier in this note, in referring to the Bangkok Declaration, UNCTAD X fully recognized the role of competition policy in bringing about a more equitable playing field at national, regional and multilateral levels.

35. Furthermore, in its plan of action, it requests UNCTAD to "continue and expand its help to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy" (Plan of Action, para. 140).

36. Resources permitting, UNCTAD intends to expand its technical assistance advisory and training services to all interested developing countries and economies in transition. This activity will include not only responding to requests for national expertise and advisory services related to drafting competition legislation, including by organizing national seminars and exchanges of expert personnel for on-the-job training in experienced competition authorities both in developed and developing countries, but also cooperating with relevant research and academic institutions and the United Nations Staff college, in line with paragraph 165 of the UNCTAD X Plan of Action.

37. UNCTAD should also, "in cooperation with UNDP, the World Bank and other relevant organizations, strengthen the capacity of public institutions for competition and consumer protection in developing countries and help them to educate the public and representatives of the private sector in this field" (para. 141). This decision by UNCTAD X is fully consonant with views expressed now and again by member countries (see, for example, Part III of the United States submission to the meeting of the WTO Working Group of 15-16 June 2000)[7]. That submission appropriately notes that there is little value mainly in enacting an antitrust law and leaving it a formality. In order to ensure the successful adoption and maintenance of pro-competitive policies throughout an economy, competition values must be understood and supported throughout society, including government, business, consumers and academia. Therefore, any new competition authority's priorities should include competition advocacy, and the creation of a "culture of competition" by educating society about competition. In this connection, the Fourth Review Conference will consider *inter alia*, in its informal consultations, experience gained so far with the establishment of competition laws and competition authorities, enforcement of the law and competition advocacy in developing countries, countries with economies in transition and relevant regional organizations. The Conference might wish to study further how best to develop ways and means to educate society at large about competition issues, including through technical cooperation programmes.

38. UNCTAD X also decided that UNCTAD "should continue to examine issues related to competition law and policy of particular relevance to development. It should prepare periodical reports on restraints in strategic sectors and their impact on developing countries and countries with economies in transition, particularly on their competitiveness" (para. 142). In this connection, the Fourth Review Conference is scheduled to discuss specifically "the role of competition policy in economic development" and competition policy in strategic sectors such as telecommunications and regulated industries. Such informal consultations might serve as a basis for launching studies in these specific issues, bearing in mind that essential strategic sectors such as telecommunications, which serve the rest of the economy, have an essential function in contributing to the economy's overall competitiveness.

39. Moreover, UNCTAD X requested UNCTAD to "study in depth the developmental impact of possible international agreements on competition" (para. 142, cont'd.). The Fourth Review Conference will have before it for consideration a revised version of the study entitled

"Experiences gained so far on international cooperation on competition issues and the mechanisms used" (TD/RBP/CONF.5/4). The Conference may wish to pursue further study of possible international agreements on competition and their effect on development.

40. UNCTAD X finally decided to "further study, clarify and monitor, including through specific country and case studies, the relationship between competition and competitiveness as well as trade-related aspects of competition" (para. 143). The Fourth Review Conference might wish to initiate specific studies related to these issues. In particular, the relationship with the TRIPS Agreement is discussed in document TD/RBP/CONF.5/6 on "How competition policy addresses the exercise of IPRs". This analysis will be further refined by the guidance given by experts at the Fourth Review Conference. UNCTAD will undoubtedly launch new studies on the relationship between competition and competitiveness, bearing in mind the study prepared by the Intergovernmental Group of Experts on "The role of competition policy in economic reforms in developing and other countries" (TD/RBP/CONF.4/2). The Fourth Review Conference might wish to give guidance to the secretariat regarding priority action in this respect.

41. Since the Third Review Conference in 1995, the general convergence of views and relative optimism about market liberalization and globalization have given way to a more mitigated analysis and often pessimistic views, fuelled by financial crises and economic problems around the world, especially in emerging markets, to the effect that globalization - often understood as reflecting "free competition at the global level" - far from having positive effects for all trading partners, increases economic disparities among countries, with the result that a number of developing countries, particularly the least developed countries, run the risk of marginalization. It should be stressed in this respect that the actual process of globalization is far from having been one of free competition where the principles of competition policy apply with uniformity at the global level. While developed countries apply those principles with respect to their domestic markets, few developing countries have so far been able to implement their competition rules effectively within their national borders. In many developing countries and economies in transition, the competition authority is new, lacking in experience and especially in financial resources, and often unable to count on continued political support. In addition, most of these countries have been used to State intervention in closed economies, and the fundamental principles of competition are new for their economic actors, businessmen and consumers. The advocacy function and educative role of the competition authority represent a considerable task which needs commensurate financial resources and, above all, time. Moreover, global markets often escape from competition rules altogether, because of the difficulties that national authorities face in coming to grips with anti-competitive practices originating in overseas markets. Hence, the system in operation so far can be compared to a market which has been partly liberalized, but where competition rules still need to be fully implemented. If liberalization and globalization are to prove beneficial, progress will have to be achieved in enforcing competition policy at the national, regional but also multilateral - or global - levels.

42. The United Nations Set, as reconfirmed by three Review Conferences, has the value of being so far the only fully multilaterally agreed principles and rules on competition. Also, it

encompasses the development dimension by endorsing the principle of special and differential treatment, especially for the least developed countries. Meeting after UNCTAD X, the Fourth Review Conference will have a full opportunity to make its contribution to bringing about a more equitable and efficient playing field both in national and in global markets, as called for in the Bangkok Declaration.

Notes

[1] See, for example, UNCTAD, *World Investment Report 1997* (United Nations publication, Sales No. E.97.II.D.10), and WTO, *Annual Report 1997*.

[2] The Singapore Declaration (WT/MIN(96)/DEC/W) was adopted on 13 December 1996 at the close of the WTO Ministerial Conference, held in Singapore from 9 to 13 December 1996.

[3] See, for example, *United States Government v. Microsoft, Inc.*

[4] See Singapore Ministerial Declaration (WT/MIN(96)/DEC/W) of 13 December 1996, para. 20.

[5] Document WT/WGTCP/W/160 of 8 June 2000, part 3.1, pp. 7-8.

[6] See TD/RBP/CONF.4/15, annex I.

[7] Document WT/WGTCP/W/142 ("Creating a culture of competition issues involved in establishing an effective antitrust agency"), submitted by the United States to the WTO Working Group on the Interaction between Trade and Competition Policy.